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No. 99-1294

IN THE

Supreme Court of the United States

HOLMES FOSTER, in his official capacity as Superintendent of Banking and Administrator of Electronic Transfer of Funds, Iowa Division of Banking, Iowa Department of Commerce,

Petitioner,

v.

BANK ONE, UTAH, NATIONAL ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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March 2000

QUESTIONS PRESENTED

Whether the court of appeals correctly applied established legal principles governing preemption under the National Bank Act, 12 U.S.C. §§ 21 *et seq.*, to a few specific provisions of Iowa law that impose onerous restrictions on the establishment and operation of Automated Teller Machines ("ATMs") by national banks?

PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING

The parties to the proceeding are correctly named in the caption, with the following exception: The Comptroller of the Currency appeared in both courts below as an *amicus curiae* in support of Bank One, Utah. The Comptroller did not seek to intervene and therefore is not a party to this proceeding.

Bank One, Utah, National Association, is a wholly-owned subsidiary of Bank One Corporation, a Delaware corporation that has issued shares to the public.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

There are multiple reasons for denying the petition. First, the decision of the court of appeals does not conflict with any decision of any other court of appeals or of this Court. To the contrary, the court of appeals applied established legal principles, recently and unanimously reaffirmed by this Court, to a few specific provisions of Iowa law that impose onerous restrictions on the establishment of Automated Teller Machines ("ATMs") by national banks. Second, Iowa's own counsel has characterized that state law provisions that were before the court of appeals as "not . . . important" to the State. C.A. App. 121. Third, Respondent's challenges to other provisions of Iowa law remain pending in the district court following the court of appeals' interlocutory decision. Fourth, the court of appeals' decision is correct. Finally, the provisions of Iowa law that were before the court of appeals are not only preempted by the National Bank Act, but are also invalid on other grounds.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 190 F.3d 844. The opinion of the district court (Pet. App. 17-76) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1999. The court of appeals denied a petition for rehearing on November 5, 1999. Pet. App. 77. The petition for a writ of certiorari was filed on February 2, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT

This case arises out of the efforts of Respondent Bank One, Utah, N.A., a national bank that has no branch offices in Iowa, to establish and operate ATMs in that State. Iowa

imposes a variety of onerous restrictions on the operation of ATMs by out-of-state banks. Three particular restrictions were before the court of appeals:

The in-state office requirement. Section 527.4(1) of the Iowa Code provides that "[a] satellite terminal shall not be established within this state except by a financial institution whose principal place of business is located in this state, one which has a business location licensed in this state under chapter 536A, or one which has an office located in this state" and meets certain additional requirements.[1]

The application-and-approval requirement. Iowa Code § 527.5(3) requires any financial institution "controlling a satellite terminal in this state" to file an "informational statement" with the State. The statement must include, among other things, "[a]n agreement with the administrator that the financial institution controlling the satellite terminal will maintain that satellite terminal in compliance with this chapter." Iowa Code § 527.5(3)(d). Under Iowa Code § 527.5(7), the Administrator has 30 days from the submission of a completed application to approve or deny establishment of an ATM. During this 30-day period, the applicant may not begin operating the ATM.

The advertising restriction. Iowa Code § 527.5(5) provides that "[a] satellite terminal location in this state shall not be used to advertise individual financial institutions or a group of financial institutions." The statute requires the operating financial institution to affix "a sign or label no larger than three inches by two inches identifying the name, address, and telephone number of the owner of the satellite

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[1] A "satellite terminal" is defined to include any ATM "located off the premises of a financial institution." Iowa Code § 527.2(20).

terminal." *Id.* The advertising restriction does not apply to ATMs located on the premises on a financial institution.

Respondent's Complaint also challenges certain other restrictions that Iowa imposes on the establishment and operation of ATMs by national banks. Those provisions were not before the court of appeals, and remain pending before the district court.[2]

Respondent entered into agreements with national retailers to operate ATMs in leased space in retail stores throughout the country. During 1997, Bank One, Utah, installed ATMs in 24 retail stores in Iowa, including 11 Sears stores. In December 1997, Petitioner filed suit against Sears (but not Respondent) in Iowa state court, alleging violations of Iowa law in connection with Respondent's ATMs in Iowa Sears stores.

Respondent shut down and removed all its ATMs in Iowa. Respondent then brought this action in federal court, seeking a declaration that Iowa's laws barring Respondent from establishing ATMs in Iowa, and imposing onerous restrictions on the operation of ATMs by national banks, are

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[2] The additional provisions include: (1) Iowa Code § 527.5(6), which regulates the "interchange fee" charged by the owner of an ATM terminal to the financial institution that issued the ATM card used by the customer; (2) Iowa Code § 527.5(2)(a), which requires ATM owners to permit "any other financial institution which has its principal place of business within this state" to use the owner's ATMs, regardless of the existence of any business relationship between the two institutions; (3) Iowa Code § 527.5(8)(a), which requires that all ATMs in Iowa be connected to a "central routing unit" approved under Iowa law; and (4) Iowa Admin. Code § 187-20.4(3)(b)(5), which requires that most ATM transactions be routed through the central routing unit, even if another ATM network could handle the transaction more efficiently. *See* Pet. App. 19-20.

preempted under the National Bank Act and invalid under the Commerce Clause and the First Amendment. Respondent also sought a preliminary injunction to prevent Petitioner from enforcing the challenged provisions during the pendency of the litigation.

The District Court's Order. The district court denied the motion for a preliminary injunction. Pet. App. 17-76. The district court agreed with the Respondent and the Comptroller of the Currency (who appeared as an *amicus curiae* in support of Respondent) that operation of ATMs is within the powers of national banks conferred by the National Bank Act. *Id.* at 23. The court nevertheless held that Respondent was unlikely to prevail on its claims that the challenged provisions of Iowa law are preempted by the National Bank Act. The court concluded that federal law does not authorize national banks to "expand operations" into States in which they do not already have a branch office and, therefore, that the in-state office requirement does not interfere with national banks' power to establish ATMs. *Id.* at 23-24.

The district court also held that Respondent was unlikely to prevail on its constitutional claims. As to the Commerce Clause claim, the court acknowledged that out-of-state national banks are "effectively bar[red]" from satisfying these requirements, but concluded that this "'discriminatory effect' is a result of federal law" rather than state law. *Id.* at 36. As to the First Amendment claim, the District Court recognized that "even a cursory review" of Iowa's advertising restriction shows that it is content-based, *id.* at 41, and that the advertisements the Bank seeks to place are "undisputedly truthful," *id.* at 42. The court nevertheless held that the advertising restriction was narrowly tailored to further the State's interest in preventing consumers from being misled into thinking that they do not have access to a particular ATM. *Id.* at 43.

The Court of Appeals' Decision. The court of appeals reversed. Pet. App. 1-16. The court of appeals noted that "'grants of both enumerated and incidental 'powers' to national banks [are] grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law.'" Pet. App. 7 (quoting *Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996)). State regulations are not preempted "when Congress 'accompan[ies] a grant of an explicit power with an explicit statement that the exercise of that power is subject to state law.'" Pet. App. 7 (quoting *Barnett Bank*, 517 U.S. at 33). Noting that Congress has expressly predicated a national bank's power to establish branches upon compliance with state law restrictions on branching, *see* 12 U.S.C. § 36, the court examined whether an ATM is a "branch" within the meaning of Section 36.

The court of appeals explained that in 1996 Congress amended Section 36 to provide: "The term 'branch,' as used in this section, does not include an automated teller machine or a remote service unit." Pet. App. 7 (quoting 12 U.S.C. § 36(j)). The court concluded that this language "clearly expresses Congress's intent" that state law authority with respect to branching by national banks no longer extends to national bank ATMs. *Id.* The court observed that the congressional intent "is made even clearer in light of" judicial decisions prior to the 1996 amendment, which had held that ATMs *were* branches for purposes of Section 36, and therefore were subject to state-law restrictions. Pet. App. 7-8 (citing *Colorado ex rel. State Banking Bd. v. First Nat'l Bank of Ft. Collins*, 540 F.2d 497, 499 (10th Cir. 1976); *Independent Bankers Ass'n of America v. Smith*, 534 F.2d 921, 948 (D.C. Cir. 1976); *Independent Bankers Ass'n v. Marine Midland Bank*, 757 F.2d 453, 463 (2d Cir. 1985)). The court of appeals drew additional support for its interpretation from the legislative history of the 1996 amendment, which states: "Section [36(j)] clarifies that an

'ATM' or 'remote service unit' is not considered a 'branch' for purposes of federal bank branching law and is therefore not subject to prior approval requirements or geographic restrictions." Pet. App. 8 (quoting S. Rep. No. 104-185, at 24 (1996)). Finally, the court of appeals noted that the Office of the Comptroller of the Currency ("OCC") has interpreted the National Bank Act as preempting the Iowa provisions of law at issue in this case, and that interpretation "is entitled to great weight." Pet. App. 9 (citing, *inter alia, Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987)). The court of appeals concluded: "Given the clear language of the 1996 amendment, its legislative history and the judicial decisions that formed the backdrop against which it was adopted, and the interpretation of the regulatory body charged with the responsibility of administering the national banking laws," Bank One is not subject to Iowa Code § 527.4(1). Pet. App. 9.

The court of appeals rejected Petitioner's argument that the Federal Electronic Funds Transfer Act, 15 U.S.C. §§ 1693-1693r ("Federal EFT Act"), alters the usual rules of preemption under the National Bank Act. The court explained that the Federal EFT Act "was enacted in 1978 'to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems.'" Pet. App. 11 (quoting 15 U.S.C. § 1693(b)). The court observed that a saving provision in the Federal EFT Act relied upon by Petitioner "is specifically limited to the provisions of the federal EFTA, and nothing therein grants the states any additional authority to regulate national banks." Pet. App. 11.

The court of appeals concluded that "in view of our holding on the preemption issue, we need not reach Bank One's remaining [constitutional] challenges to the Iowa statutes." Pet. App. 12.

Judge Bright dissented. Pet. App. 12-16 Although the dissenting judge agreed with the majority that geographic restrictions on the establishment of ATMs no longer apply to national bank as a result of the amendment to 12 U.S.C. § 36, he concluded that other provisions of Iowa law are not geographic restrictions and are not preempted. The dissenting judge viewed the court's decision as contrary to a "principle of competitive equality," under which national banks and state banks "compete on an even footing." Pet. App. 15. The dissenting judge did "not attempt to delineate whether some other restrictions in the Iowa Code are not applicable to national banks," stating that "[t]hose issues may be revisited on further litigation in this case." Pet. App. 16. The dissenting opinion did not discuss Petitioner's argument that the Iowa laws were saved from preemption by the Federal EFT Act. Nor did it consider whether the provisions at issue are invalid under the Commerce Clause or the First Amendment.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' DECISION DOES NOT CREATE A CONFLICT.

The court of appeals' decision does not conflict with any decision of this Court or another court of appeals. To the contrary, the court of appeals applied established legal principles, recently and unanimously reaffirmed by this Court, to a few specific provisions of Iowa law – provisions that the State itself has characterized as "not . . . important." C.A. App. 121. In *Barnett Bank v. Nelson*, 517 U.S. 25, 38 (1996), this Court reaffirmed the principle that state laws are generally preempted insofar as they "forbid, or impair significantly" the exercise of powers conferred on national banks by the National Bank Act. Petitioner acknowledges (Pet. 13) that *Barnett Bank* supplies the governing legal standard in this case.

Petitioner suggests in passing (Pet. 8) that the court of appeals' decision conflicts with *Valley Bank of Nevada v. Plus System, Inc.*, 914 F.2d 1186 (9th Cir. 1990). There is nothing even remotely approaching a conflict between *Valley Bank* and the decision in this case. To begin with, *Valley Bank* was not even a preemption case; the issue was whether a Nevada statute violated the Commerce Clause.[3] Moreover, the Nevada law at issue in *Valley Bank* did not impose any restrictions on the operation of ATMs by national banks. Instead, the law *allowed* (but did not require) Nevada banks to impose ATM charges. The single sentence that Petitioner quotes from the *Valley Bank* opinion supports the uncontroversial conclusion that "States have a legitimate interest in regulating banking" for purposes of the Commerce Clause.[4] *Id.* (citing *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 38 (1980)). The quoted sentence was a reference to Congress's rejection of a proposal to "annul[ ] all State EFT laws." *Id.* (quoting S. Rep. No. 95-915, at 18, *reprinted in* 1978 U.S.C.C.A.N. 9273, 9403, 9420). The court of appeals in this case certainly did not hold that the Federal EFT Act annuls all state EFT laws, but only that the Federal EFT Act did not annul or impliedly repeal provision of the National Bank Act. The court of appeals' decision thus creates no conflict with *Valley Bank*.

Because there is no conflict with the decision in *Valley Bank*, Petitioner errs in asserting (Pet. 11) that the decision in this case creates "uncertainty" in connection with other

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[3] Because *Valley Bank* has very little connection to the issues in this case, it is not surprising that Petitioner did not cite that case in any of its submissions to the court of appeals.

[4] The sentence ("Congress specifically has declined to restrict state regulation in the ATM context.") appears on page 1195 of the Ninth Circuit's opinion not on page 1194 as stated in the Petition.

pending litigation. Moreover, Petitioner fails to disclose that recent lower court decisions on related issues are entirely in accord with the court of appeals' decision in this case. *See First Union Nat'l Bank v. Burke*, 48 F. Supp. 2d 1132 (D. Conn. 1999) (holding that the Federal EFT Act is not an affirmative grant of authority to the States to regulate national banks, and that the OCC has exclusive regulatory authority with respect to national banks); *Bank of America v. City and County of San Francisco*, 1999 WL 1243845 (N.D. Cal. Nov. 29, 1999) (holding, on motion for preliminary injunction, that ordinances barring national banks from charging ATM access fees are likely to be preempted), *appeal pending*, Nos. 99-17590, 17591 (9th Cir.); *New Jersey Bankers Ass'n v. Township of Woodbridge*, No. 00-702 (JAG) (D.N.J. Feb. 17, 2000) (entering temporary restraining order with respect to ordinance prohibiting ATM access charges); *First Nat'l Bank of McCook, Neb. v. Fulkerson*, No. 98-D-1024 (D. Colo. Mar. 7, 2000) (holding that Colorado's restrictions on branch banking do not apply to a national bank's operation of a Loan Production Office, Deposit Office, and ATM).

II. THE PETITION OVERSTATES THE IMPORTANCE OF THE COURT OF APPEALS' DECISION.

The court of appeals' decision applies only to the handful of specific provisions of Iowa law that were before it. Moreover, Petitioner's assertions concerning the importance of these provisions to consumers in Iowa and elsewhere (Pet 9-11) contradict his own counsel's representations to the district court. Petitioner's counsel stated that the geographic and advertising restrictions are "not what's important about this case" and "not what's important about [Iowa's] EFT system," but are "ancillary and merely complementary to the basic structure of the system." C.A. App. 121 (Tr. of Hearing before Judge Longstaff). Petitioner's counsel also

stated that the application and approval requirements are so insignificant that "[w]e would be glad in the State of Iowa to not have [national banks] file any papers either. They don't need to file the papers, they just need to go ahead and operate within the confines of our system." *Id.* at 137.

The court of appeals' decision does not leave national bank ATMs in a regulatory vacuum. National banks are fully regulated by the OCC. Indeed, with limited exceptions that are not applicable in this case, Congress has conferred on the OCC *exclusive* authority to enforce both federal banking laws and state banking laws (to the extent the latter are not preempted) with respect to national banks. *See* 12 U.S.C. §§ 484(a), 1813(q)(1); *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 987-89 (3d Cir. 1980); *First Union Nat'l Bank v. Burke*, 48 F. Supp. 2d 132, 143-46 (D. Conn. 1999).

III. THE COURT OF APPEALS' DECISION IS INTERLOCUTORY.

This Court usually will decline to "issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order." *American Constr. Co. v. Jacksonville, T. & K. Ry. Co.*, 148 U.S. 372, 384 (1893); *see also Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.18, at 195-96 (7th ed. 1993). In this case, Respondent appealed from an interlocutory order of the district court denying a motion for a preliminary injunction. Respondent's appeal was limited to a few specific provisions of Iowa law; Respondent did not appeal from the denial of a preliminary injunction with respect to several other provisions of Iowa law challenged in Respondent's complaint (including Iowa's requirement that ATM transactions be routed through Iowa's monopolistic "Shazam" ATM network, its requirement that all ATMs in Iowa be interconnected to all other ATMs in the State, and its restriction on inter-bank fees for ATM transactions). Those

issues remain pending in the district court following the remand from the court of appeals. Accordingly, this Court should adhere to its usual practice of declining to grant a petition for review "until final decree." *Hamilton-Brown*, 240 U.S. at 258.

IV. THE COURT OF APPEALS' DECISION IS CORRECT.

The court of appeals' decision is well-reasoned and correct. The 1996 amendment to 12 U.S.C. § 36 provides, in clear terms, that national bank ATMs are no longer considered "branches," and therefore are no longer subject to state-law branching restrictions. Prior judicial decisions (which had held that ATMs were subject to state law restrictions precisely because they *were* branches for purposes of § 36), the legislative history of the 1996 amendment, and the views of the Comptroller of the Currency all confirm that the statutory language means what it clearly says: ATMs are no longer deemed to be branches, and are no longer subject to geographical restrictions.

The court of appeals' rulings with respect to the other state law restrictions at issue are straightforward applications of settled law. It has long been established that a state may not require a national bank to apply to and obtain permission from state officials in order to exercise powers conferred by federal law. *See First Nat'l Bank of E. Ark. v. Taylor*, 907 F.2d 775, 780 (8th Cir. 1990) (a State may not bar national banks from exercising their lawful powers "either by direct coercion or through a license requirement"); *Bank of America v. Lima*, 103 F. Supp. 916, 918 (D. Mass. 1952) (the exercise of national bank powers is not subject to approval by state officials). In addition, Iowa's advertising restriction is very similar to the restrictions held preempted by this Court in *Franklin National Bank v. New York*, 347 U.S. 373 (1954), and by the OCC in Interpretive Letter No. 789, [1997

Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-216, at 90,244 (June 27, 1997).

Petitioner is incorrect in asserting (Pet. 13-14) that the court of appeals' decision upsets a "firmly entrenched policy of competitive equality" between national banks and state-chartered banks. That assertion confuses branching with other national bank powers. In enacting 12 U.S.C. § 36, "Congress intended to place national and state banks on a basis of 'competitive equality' *insofar as branch banking was concerned.*" *National Bank of Logan, Utah v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966) (emphasis added). In 1996, however, Congress amended § 36 to expressly exclude ATMs from the definition of "branch." 12 U.S.C. § 36(j). Thus Congress, having adopted a "competitive equality" principle for branches, determined that the principle should no longer apply to ATMs.

Outside the realm of § 36 and branching, as the court of appeals correctly recognized, the governing legal principle is that "Congress would not want States to forbid, or impair significantly," the exercise of a national bank power. *Barnett Bank*, 517 U.S. at 33. That principle applies without regard to whether the state law at issue treats national banks less favorably than state-chartered banks. For example, the state law at issue in *Barnett Bank* applied equally to national banks and state banks, but nevertheless was preempted because it interfered with the exercise of a national bank power. *See also Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996). Decisions such as *Barnett* and *Smiley* recognize that the National Bank Act was intended to facilitate the creation of "a national banking system." *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 314-15 (1978).

Petitioner is also incorrect in asserting that the Federal EFT Act saves the state law provisions at issue from preemption under the National Bank Act. The Federal EFT

Act regulates electronic funds transfers, a broad category of transactions that includes, in addition to ATM transactions, direct deposits and withdrawals and deposits and withdrawals initiated by telephone. The EFT Act imposes limited federal regulation on such transfers by requiring certain disclosures and limiting consumer liability for unauthorized transfers. The court of appeals' decision gives the Federal EFT Act its full force and effect without encroaching on the National Bank Act.

Petitioner bases his argument on a saving provision in the Federal EFT Act, which provides that "*[t]his subchapter* does not annul, alter, or affect the laws of any State relating to electronic funds transfers, except to the extent that those laws are inconsistent with the provisions of *this subchapter*." 15 U.S.C. § 1693q (emphasis added). The court of appeals correctly explained that "this anti-preemption provision is specifically limited to the provisions of the federal EFTA, and nothing therein grants the states any additional authority to regulate national banks." Pet. App. 13. *Cf. International Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987) (saving clause providing that "nothing in this section" preempts state common law does not prevent preemption by other sections of the same statute). No court (and no judge in the courts below) has accepted Petitioner's argument that the Federal EFT Act's saving clause affirmatively grants "open-ended" authority to the States to regulate core banking transactions of national banks, so long as those transactions involve electronic funds transfers. Pet. 16.[5]

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[5] The 1999 amendments to the Federal EFT Act provide a federal statutory penalty if an ATM operator imposes an access fee and fails to provide notice of the fee and an opportunity for the customer to opt out of the transaction. Those amendments contain no grant of authority to the States to regulate ATMs. *See* Gramm-

(...continued)

Finally, the area of disagreement between the majority and the dissenting opinions in this case is relatively narrow. First, the dissenting judge did not accept (or even discuss) Petitioner's main argument, that the Federal EFT Act grants States regulatory authority with respect to national banks. Second, the dissenting judge *agreed* with the majority that the principal state law provision at issue – the restriction on the establishment and operation of ATMs by out-of-state national banks – is preempted. Pet. App. 12-13. Third, the dissenting judge discussed only one subpart of one of the remaining state law provisions at issue, leaving other provisions to "be revisited on further litigation." Pet. App. 16. Fourth, the dissenting judge did not address Respondent's First Amendment and Commerce Clause arguments, which provide an independent ground for invalidating the provisions at issue.

V. IOWA'S RESTRICTIONS ARE INVALID ON OTHER GROUNDS.

The court of appeals agreed with Respondent and the OCC that Iowa's restrictions on the establishment and operation of ATMs are preempted, and therefore the court did not consider Respondent's arguments that those restrictions also violate the Commerce Clause and the First Amendment. Pet. App. 12. Those arguments provide an additional ground for the result reached by the court of appeals.

Iowa's effort to shield its in-state financial institutions from out-of-state competition runs afoul of the Commerce Clause. In *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), the Court invalidated, on Commerce Clause

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Leach-Bliley Act of 1999, Pub. L. No. 106-102, § 7-2, 113 Stat. 1338 (1999) (codified at 15 U.S.C. § 1693b(d)(3)).

grounds, Florida laws that barred banks and bank holding companies whose principal operations were located outside Florida from operating investment subsidiaries or giving investment advice within the State. The Court held that the state laws "discriminate[d] among affected business entities according to the extent of their contacts with the local economy," *id.* at 42 (emphasis omitted), and thus violated "the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition." *Id.* at 44 (citations omitted). Iowa Code § 527.4, like the Florida laws struck down in *Lewis*, discriminates among financial institutions according to the extent of their contacts with Iowa, and thereby uses the State's power to protect in-state competitors from out-of-state competition. Accordingly, § 527.4 is invalid under the Commerce Clause.[6]

In addition, Iowa Code § 527.5(5) restricts commercial speech in violation of the First Amendment. As the district court recognized, "[e]ven a cursory review of Iowa Code § 527.5(5) indicates that it is content-based," because the restriction applies only to advertising concerning financial

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[6] The fact that the Iowa law formally applies to both in-state and out-of-state competitors does not save it from invalidity. A state law need not "be drafted explicitly along state lines in order to demonstrate its discriminatory design." *Amerada Hess Corp. v. New Jersey Taxation Div.*, 490 U.S. 66, 76 (1989) (discussing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984)). In-state competitors automatically meet Iowa's in-state office requirement by virtue of their in-state status. Out-of-state national banks cannot meet the requirement (because they are prohibited under Iowa law from establishing de novo branches, and that prohibition is saved from preemption by 12 U.S.C. § 36). A national bank's only options under Iowa law are to merge with an in-state bank or to pay an in-state competitor to "sponsor" it.

institutions, and not to "any other type of advertisement." Pet. App. 66. In addition, the District Court found that

> Bank One does not seek to place false and deceptive advertisements on its ATMs. Indeed, the advertisements Bank One seeks to place are undisputedly truthful, and a motive for placing deceptive information regarding financial institutions on ATMs is difficult to imagine. Thus, the advertisements Bank One seeks to employ constitute the type of commercial speech protected by the First Amendment.

Pet. App. 68. Although Petitioner continues to argue that "too much information can lead to 'information overload,'" Pet. 10, it has long been established that a State may not "keep[ ] the public in ignorance of the entirely lawful terms that [competitors] are offering." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). Iowa offered no evidence that its ban on advertising at ATMs is necessary to prevent consumers from becoming confused about whether they have access to ATMs. *See Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (government "seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"). Moreover, the advertising ban does not apply to ATMs located on the premises of branch offices, even though consumers are no less likely to become confused about whether they have access to such ATMs. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488-90 (1995) (state restriction unconstitutional where other provisions undermine state's aim). Iowa also failed to demonstrate that the advertising restriction is a "narrowly tailored" response to the problem it has identified. A variety of less restrictive alternatives are open to Iowa, including public education to inform

consumers that they need not be a bank customer to use the bank's ATMs.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[7] Iowa's advertising ban is similar to the ban on "For Sale" signs held unconstitutional in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977). In *Linmark*, this Court explained that, "[a]lthough in theory sellers remain free to employ a number of different alternatives, . . . [t]he options to which sellers realistically are relegated . . . involve more cost and less autonomy than 'For Sale' signs; are less likely to reach persons not deliberately seeking sales information; and may be less effective media for communicating the message that is to be conveyed by a 'For Sale' sign in front of the house that is to be sold." *Id.* at 93 (citations omitted). For an out-of-state bank such as Respondent, the most effective means of advertising its ATMs and other banking products in Iowa is clearly advertising on the ATM itself.